

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel.
W. A. DREW EDMONDSON, in his capacity as
ATTORNEY GENERAL OF THE STATE OF
OKLAHOMA and OKLAHOMA SECRETARY
OF THE ENVIRONMENT C. MILES TOLBERT,
in his capacity as the TRUSTEE FOR NATURAL
RESOURCES FOR THE STATE OF OKLAHOMA,**

Plaintiff,

vs.

) 05-CV-0329-TCK-SAJ

**TYSON FOODS, INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,
AVIAGEN, INC., CAL-MAINE FOODS, INC.,
CAL-MAINE FARMS, INC., CARGILL, INC.,
CARGILL TURKEY PRODUCTION, LLC,
GEORGE'S, INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC., SIMMONS FOODS, INC.,
and WILLOW BROOK FOODS, INC.,**

Defendants.

**TYSON FOODS, INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,
GEORGE'S, INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC., SIMMONS FOODS, INC.,
and WILLOW BROOK FOODS, INC.,**

Third Party Plaintiffs,

vs.

City of Tahlequah, *et al.*,

Third Party Defendants

**THIRD PARTY PLAINTIFFS' UNOPPOSED
MOTION TO SERVE THIRD PARTY COMPLAINT
ON CERTAIN THIRD PARTY DEFENDANTS OUT OF TIME**

In accordance with N.D. LCvR 7.1(g), Third Party Plaintiffs in the above-styled and numbered cause hereby move the Court for an Order permitting Third Party Plaintiffs to serve the Third Party Complaint upon two Third Party Defendants out of time. In support of their Motion, Third Party Plaintiffs state as follows:

STATEMENT OF FACTS

1. Neither a trial date nor any other deadlines have been established in this action; and as such, the requested extensions will not impact the proceedings in this action.
2. On February 24, 2006, Third Party Plaintiffs filed their *Motion to Enlarge Time in Which to Serve Third Party Complaint* wherein Third Party Plaintiffs requested that the Court set a date for service for 60 days from the entry of an Order on their Motion. (Docket 215) The Court granted that Motion on March 20, 2006. (Docket No. 234) In its Order, the Court gave Third Party Plaintiffs until May 20, 2006 to effectuate service.
3. Third Party Plaintiffs were unable to serve John T. Cripps until May 22, 2006, two days after the service deadline. George Cripps, who is a joint tenant in the property, which is subject to the Third Party Plaintiffs' allegations, was served on May 11, 2006. Third Party Plaintiffs originally attempted to serve John Cripps by certified mail restricted delivery on or about March 20, 2006. The Summons and Third Party Complaint were returned unclaimed. Upon receipt of the unclaimed documents, Third Party Plaintiffs undertook efforts to identify a physical address where they could serve Mr. Cripps personally. After locating Mr. Cripps' physical address, Third Party Plaintiffs provided the Summons and Third Party Complaint to a process server, Kathy Trotter. Prior to the May 20, 2006 deadline set by the Court, the process server contacted

Mr. Cripps to inform him that she had documents to serve upon him, but she was unable to serve him until Monday, May 22, 2006. A copy of the service of process on John T. Cripps is attached hereto as Ex. "1." Third Party Plaintiffs request that the Court find that service of the Third Party Complaint and Summons on John T. Cripps on May 22, 2006, timely. The status of service upon Mr. Cripps was not known by counsel until after the expiration of the extended service period.

4. Third Party Plaintiffs have been unable to obtain service upon Ivan Marion prior to the Court's service deadline of May 20, 2006. Although the property owned by Mr. Marion is located in Oklahoma, Mr. Marion resides in Arkansas. On or about March 20, 2006, Third Party Plaintiffs sent the Summons and Third Party Complaint to Mr. Marion by certified mail restricted delivery, which came back unclaimed. A copy of the green card and envelope stating the Summons and Third Party Complaint sent to Mr. Marion was unclaimed is attached hereto as Ex. "2." The unclaimed Summons and Third Party Complaint were received on or about May 16, 2006. Third Party Plaintiffs' counsel was unable to verify Mr. Marion's physical residence prior to the expiration of the service date under the Court's Order. Third Party Plaintiffs request an additional twenty days from the Court to obtain a process server in Arkansas who can personally locate and serve Mr. Marion.

5. Third Party Plaintiffs have contacted counsel for Plaintiffs who state that they do not oppose Third Party Plaintiffs filing of this Motion requesting the Court grant them the ability to serve Ivan Marion out of time, and accept service upon John T. Cripps out of time.

ARGUMENTS AND AUTHORITIES

Third Party Plaintiffs' request to serve out of time is limited to only two Third Party Defendants out of the two hundred fifty six identified in their Third Party Complaint. Under the

Federal Rules of Civil Procedure, it is clearly within the Court's discretion to enter an order which extends or modifies the time limit for service. Fed. R. Civ. P. 6(b) and 4(m); *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995) (discussing the trial court's discretion and noting the abuse of this discretion standard of review); *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (recognizing that a motion under Rule 6(b) is the proper mechanism for seeking relief from the 120-day time limit). Although relief from the time limit imposed by Rule 4(m) is generally premised on a movant's proof of "good cause," the 1993 amendments to the Rule broadened the trial court's discretion to permit extensions of the 120-day limit even when good cause is not shown. *Henderson v. United States*, 517 U.S. 654, 662 (1996) (citing the 1993 Advisory Committee's Notes on Fed. R. Civ. P. 4, 28 U.S.C.App., p. 654); *Espinoza*, 52 F.3d at 840-41 (same); *Hunsinger v. Gateway Management Associates*, 169 F.R.D. 152, 154 (D. Kansas 1996) (same). The *Espinoza* court held that within the Tenth Circuit, trial courts should make a preliminary evaluation of whether the movant has shown good cause for extending the time for service. *Espinoza*, 52 F.3d at 841. If the showing is made, the movant is entitled to a mandatory extension of time. *Id.* Failing a showing of good cause, the court should nonetheless proceed to consider "whether a permissive extension of time is warranted." *Id.*

Based upon the current procedural posture of this action and the efforts made by the Third Party Plaintiffs in attempting to obtain service, good cause exists in support of the Third Party Plaintiffs' request for an enlargement of the time limit for service for Marion Ivan and a finding of timely service on John T. Cripps. Neither the additional 20 days requested by Third Party Defendants in which to serve Marion Ivan nor the Court's finding acceptance of timely service on John T. Cripps two days after its imposed deadline will hinder the progression of this case, or cause prejudice to the Plaintiffs or Third Party Defendants in this matter. Moreover, it

will not cause delay or prohibit the Third Party Plaintiffs and Third Party Defendants from fulfilling their obligations under Fed. R. Civ. P. 26 or hinder the Court's ability to rule on the pending matters before it. Accordingly, whether analyzed under the "good cause" standard or under the discretionary permissive standard, a decision by this the Court to permit service on Ivan Marion and John T. Cripps after May 20, 2006, would be prudent and justified.

CONCLUSION

For good cause shown, the Third Party Plaintiffs respectfully request that the Court enter an Order: (1) finding that service upon John T. Cripps on May 22, 2006, was timely; and (2) granting Third Party Plaintiffs and additional twenty days to personally serve Ivan Marion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 16th day of June 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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